IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

CARL L. YAEGER
Foshay Tower
Minneapolis 2, Minnesota
Attorney for Petitioner

ROBERT J. RAFFERTY
30 N. LaSalle Street
Chicago 2, Illinois
Of Counsel.

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PETITIONER'S REPLY BRIEF.

I.

Respondent's Additional Statement of Facts does not include facts warranting the reversal of the jury verdict and the trial court judgment thereon.

The respondent has included a Statement of Additional Facts in its brief.

Therein it states that petitioner had occasion to pass over the house track switch every day. This is not the fact. The track was closed to trainmen while being repaired. (R. 67) Webb passed through Mt. Olive almost daily but he did not know if he went on to the part of the track involved in the accident. (R. 68)

The Additional Statement of Facts also says that the repairs to respondent's house track were made in March,

1952. Petitioner, having secured a jury verdict and trial court judgment thereon, is entitled to have the facts and inferences thereon, favorable to him, and these alone, considered on review.

Petitioner testified that the repairs were made about three weeks before the accident in question, "in the month of June" 1952. (R. 68) It is true respondent's witness testified that the repairs were made in March of 1952, but he testified that his records, which would show when the repairs were made, had been destroyed, even though petitioner's claim was then pending. (R. 76).

Respondent disputes petitioner's contention that the clinker was buried in its roadbed. Suffice it to say the jury could have found this to be the fact.

The following excerpts from the record establish this contention of petitioner:

• • •

Q. Before you took this step, at which time you (the petitioner) had the accident—did you have occasion to look at the ground.

A. Yes, sir.

Q. What, if anything, did you see then?

A. It was level, looked like good footing, outside of being a little loose. (R. 43)

When questioned about the clinker's position after the accident:

Q. John, did you have any occasion at that time to see where the clinker had been?

A. Yes, sir, there was a hole right by the side of the clinker." (R. 44)

On cross examination of petitioner, the following was elicited:

> "Q. You don't know whether it was slightly out of the ground or whether it was buried completely in the ground or exactly how?
>
> A. It must have been completely buried, covered over." (R. 60)

With reference to its position after the accident the following was said:

> "Q. And at that time it was just barely discernible, was it not?
>
> A. No, sir. It was partially kicked out of the cinders and there was a hole there by the side of it. (R. 61)
>
> • • •
>
> Q. And do you recall whether this statement (taken by respondent's claim agent and admitted in evidence) had in it:
>
> "The cinders were stirred up and loose, and this large cinder, about six inches in circumference, was buried in the loose cinders around it."?
>
> A. Yes, sir." (P. Ex. 2, R. 65, 111)

II.

Petitioner sustained his burden of proof if there was probative evidence from which the jury could reasonably infer negligence of the respondent.

Respondent contends that petitioner has misconstrued the opinion of the Court of Appeals. It states that respondent has no quarrel with the proposition that the petitioner need not negate inferences of negligence of third persons in order to recover under the Federal Employers' Liability Act.

The fact that respondent and petitioner agree on this important proposition of law simplifies the dispute be-

tween them. It does not change the fact that the Court of Appeals determined that no probabilities could be deduced from the evidence presumably because the offending clinker might have been placed in the Illinois Central roadbed by the L. & N. Railroad or by a stranger.

The opinion of that Court says:

> "There is no evidence as to the agency whereby the hazard was placed in or on the roadbed. Defendant's lines are in close proximity to and are connected with those of the L. & N. Plaintiff testified that the facilities of the two roads were connected to permit the interchange of freight cars between them. A photographic exhibit which, according to plaintiff's testimony, substantially represents the conditions at the scene of the accident, reveals several buildings in the near vicinity; there is no evidence to show whether these are the property of defendant or of the L. & N. or of some other stranger to the occurrence. The right of way is not fenced, and is, therefore, accessible to the public; there is no evidence as to whether or not the premises are frequented by strangers. There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation." (R. 144)

It is respectfully submitted that the clear import of this language of the Court of Appeals is that there are "possibilities" that the offending clinker was placed in respondent's roadbed by the L. & N. Railroad or a stranger. The only way that the "possibility" of respondent's negligence could be converted to the "probability" required by the Court of Appeals was by negating the possibilities of negligence of the other railroad and of strangers or by proving, beyond a reasonable doubt,

that the Illinois Central section men placed the clinker in the roadbed when they raised it five inches.

The Court of Appeals, by suggesting that the L. & N. Railroad may have been responsible for the clinker in the I.C. house track roadbed, does not help the respondent herein even though there is not a shred of evidence to support this possibility.

In *Corpus Juris Secundum*, Vol. 56, Sec. 212 (d) (Master and Servant) page 921, it is said:

> "* * * where it has allowed another corporation to run its trains over its tracks, it has been held that such consenting company remains liable for the negligence of the other company as much as it would be for that of its own."

In *Armstrong* v. *C. & W. I. R. R. Co.*, 183 N.E. 478, 480; 350 Ill. 426, 431 (Ill. Sup. 1932), the Court says:

> "The principle is thoroughly established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another whom the owner authorizes or permits to use its tracks, both railroad companies are liable to respond in damages to the party injured. (citations) * * * and although the relation of lessor and lessee is not shown to exist, the rule applies to cases where the owner permits another to use its tracks." (citations)

In accord is *Wegman* v. *Gt. Northern Ry. Co.*, 249 N.W. 422, 189 Minn. 325 (Minn. Sup. 1933).

Since the respondent, Illinois Central Railroad Company is responsible for its own negligence in maintaining its track and roadbed, and responsible for the negligence of the L. & N. Railroad while using this track and roadbed, the only escape for the respondent is that a stranger's misconduct caused petitioner to be injured.

The jury could have drawn this inference and found against the petitioner, but it did not do so. It is not surprising that the jury gave no consideration to this speculative and remote possibility. There is no conceivable reason why a stranger should come on the respondent's right-of-way and secretly and furtively bury a clinker therein.

As was said in *Wabash Screen Door Co.* v. *Black,* 126 F. 721, 725 (C. A. 6, 1903):

> "But in the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of. The theories suggested may be forced and fanciful, finding no reasonable foundation in the facts proved. They may be explanations which do not explain; which the common sense of the jury, when applied to the testimony, would instantly reject."

Terminal R. Assn. v. *Farris* (C.A. 8, 1934) 69 F. (2d) 779 at page 785 holds:

> "The fact that hypothesis incompatible with the liability of the appellant may be conjectured or imagined when such are not based on any testimony in the case, affords no reason to reverse a judgment which is supported by the testimony."

In *Foster* v. *Union Starch & Refg. Co.,* 137 N.E. 2nd 499, 502 (Ill. App. 1956), the railroad employee was injured on the premises of the starch company due to a falling pinch bar. There was a dispute whether either defendant was negligent. In reviewing the matter the Appellate Court said:

> "We have concluded that the circumstances thus disclosed, do point to this defendant's employees as

the ones who are responsible for leaving the bar in that position. There are, of course, other possibilities which cannot be excluded with certainty. Under this condition, it is the law of this state that a jury question is presented, since it is only necessary that the conclusion arrived at by the jury be based on an inference that is itself reasonable under the facts.

'A verdict may not be set aside merely because the jury could have drawn different inferences or because judges feel that other conclusions than the one drawn would be more reasonable. *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N.E. 2d 847, 854. A plaintiff is not required to prove his case beyond a reasonable doubt or exclude every hypothesis suggesting a cause other than negligence. *Heimsoth* v. *Falstaff Brewing Corp.*, 1 Ill. App. 2d 23, 116 N.E. 2d 193."

In *Weiand* v. *So. Pac. Co.*, 93 P. 2d 1023, 1025 (Cal. Dist. Ct. App. 1939) the Court says:

"If however plaintiff has proven sufficient facts to justify a verdict upon one theory the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury."

There was ample probative evidence as outlined on pages 4 to 6 of Petitioner's Brief on the Merits from which respondent's negligence and its causal relation to petitioner's injury could be reasonably referred.

It is a most logical conclusion, when a large clinker is found in a roadbed which is only three weeks old, that respondent's section hands had buried it in the new ballast, or failed to remove it from the ballast; particularly since respondent's witnesses made frequent visual

surface inspections and did not see the clinker in question on top of the roadbed.

Since the presence of the clinker, by the testimony of petitioner and the respondent's witnesses, rendered the premises unsafe for a trainman to walk, the jury had the right to find respondent guilty.

Screening, sifting or raking would have disclosed the presence of the clinker. Respondent did none of them.

As was said in *Stone* v. *New York, C. & St. L. R. Co.*, 344 U.S. 407, 409 (1953):

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. * * * The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury * * *."

III.

Respondent's cases and argument are not controlling.

Gulf, Mobile & N. R. Co. v. *Wells*, 275 U.S. 455 (1928), turned on the fact that the engineer, who was allegedly negligent in giving the train a sudden and unnecessary jerk, was not shown to have known that Wells was attempting to board the train or that he was in a position where a lurch or jerk might injure him.

Hawkins v. *Clinchfield R. Co.*, 266 S.W. 2d 840 (Tenn. App. 1953), involved an employee stepping on a board with a nail in it. There was no evidence from which a jury might reasonably have inferred that the railroad was responsible for the presence of the board and in the absence of such proof, notice was required. Here there was evidence from which the jury might reasonably have

concluded that the respondent was responsible for the presence of the clinker which injured Mr. Webb. We submit that if the board had been buried in a newly constructed roadbed, the case would have been decided otherwise.

Patton v. *Texas & P. R. Co.*, 179 U.S. 658 (1900), is relied upon by the Court of Appeals and the respondent. It pre-dated the statute upon which petitioner's cause of action arose and while never specifically overruled it has been cited by this Court but once in the last 15 years, and then in *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 353 (1942), to illustrate the point that at common law the master was bound to use ordinary care to furnish his employee with a safe place to work.

United States v. *Crume*, 54 F. 2nd 556, 558 (C.A. 5, 1931) involved a claim for total disability on a war risk insurance policy. The claimant's own testimony was that he had worked continuously since his discharge from the service and the only physician who was called by the plaintiff did not substantiate his claims of total disability.

This case did not involve even possibilities of the plaintiff being totally disabled, much less probabilities thereof, and so the Court of Appeals correctly ruled for the government. The opinion recognizes the right of a jury to draw reasonable inferences from the evidence.

Cross Co. v. *Simmons*, 96 F 2d 482 (C.A. 8, 1938) turned on the question whether plaintiff's decedent (Soars) was or was not an invitee on the premises of the defendant. One Murphy was invited on the premises of the defendant to perform some work and Soars accompanied him. Soars did not work for Murphy, he had never been on the defendant's premises before and had no duties to perform on this trip. There was no evidence from which

the jury could have inferred that he was an invitee, and hence the Court correctly held that the jury could not be permitted to speculate on Soars' status as an invitee.

Love v. *New York Life Ins. Co.*, 64 F. 2d 829 (C.A. 5, 1933), was a case on an insurance policy where the company defended a double indemnity claim by alleging the insured committed suicide. He was an embezzler, took his own gun into a vault and was found dead. In a two to one decision the Court of Appeals upheld the trial court's directed verdict for defendant.

On page 832 in concluding the opinion it says:

> "* * * in our opinion the only reasonable or probable inference to be drawn from the evidence, construed most favorable for the plaintiff, is that the gunshot wound which caused Love's death was intentionally self inflicted—."

New York Life Ins. Co. v. *Trimble,* 69 F. 2nd 849, (C.A. 5, 1934), is another case on an insurance policy where the defendant resisted a double indemnity claim on the grounds that the decedent committed suicide. His body was found with his hand gripping a pistol and powder marks on his temple. The bullet come from the gun. There were no signs of a struggle and none of his property was missing. The Court said (p. 850) "verdicts must rest on probabilities, not on bare possibilities" citing *Love* v. *New York Life Ins. Co.* The concurring opinion says that plaintiff's own proof showed the decedent died of self-inflicted wounds. There was no need to distinguish "possibilities" or "probabilities" as there was only one possible conclusion to be drawn in the case.

None of respondent's cases are even remotely similar on the facts, few involve an interpretation of the Federal Employers' Liability Act and there is not one case cited

which overrules the pronouncements of this Court in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350 (1942); *Wilkerson* v. *McCarthy*, 336 U.S. 42 (1948); *Lavender* v. *Kurn*, 327 U.S. 645 (1946), and the other cases cited on page 18 of Petitioner's Brief on the Merits which hold that a jury can draw reasonable inferences from the proven facts and that a Court of Appeals cannot substitute its judgment for that of the jury.

Despite the fact that *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294 (1949) and *Southern R. Co.* v. *Puckett*, 244 U.S. 571 (1916) are cases of railroad employees who were injured by stepping on clinkers, the respondent does not even discuss them but instead searches the record for facts favorable to it and strenuously argues them.

The Court of Appeals and respondent both argue that "plaintiff still would not be entitled to recovery unless it (the jury) was allowed also to speculate that it is negligence *per se* to allow such an object (the clinker) to become mixed in with the fine ballast used in improving its roadbed." (R. 144)

In *Corpus Juris Secundum*, Vol. 65, Par. 1 "e", (Negligence) page 323, it is stated that:

> "This distinction between negligence *per se* and negligence not *per se* respects merely the method by which the existence of negligence is to be ascertained in particular instances. When once its existence is determined, whether through the court's judicial cognizance or the jury's finding as a matter of fact, there is no further distinction made; and the one form of negligence has, in the further consideration of the case, just the same effect as the other, no more, no less. When the standard of conduct of a reasonable man is expressly defined by legislative enactment or judicial decision, the failure to conform to that standard is called negligence *per se*."

It was not necessary for the jury to "speculate" that the respondent was guilty of negligence *per se*. The jury could reasonably have found from the record that the respondent did not furnish petitioner a safe place to work. Respondent's own witness testified that a fist size clinker imbedded in a roadbed near a switch made for an unsafe place to work. (R. 87)

Somewhat similar to the case at bar is *Thompson* v. *Gibson*, 290 S.W. 2d 305 (Ct. Civ. App. Tex., 1956). There the employee was injured when he stepped on a stone which rolled in loose gravel in a railroad yard which had been constructed about six months before the accident in question. He testified that he did not see the "rock" before or after he fell.

The Court of Appeals in affirming the trial court's judgment for plaintiff says at page 309:

> "We are of the opinion that it was for the jury to determine whether defendant's failure to provide him with a reasonably safe facility whereby the distance from the round house to the engine might be traversed, or to make reasonably safe the premises necessary to be traversed in reaching the engine, was negligence and a proximate cause of his injuries, particularly in view of the fact that assumption of risk is not a defense to suits for damages in this kind of case." (citations).

IV.

The issue of negligence was for the jury, not for the Court of Appeals, to determine.

The constitutional right to a trial by jury in Federal Employers' Liability Act cases has been diligently and vigilantly defended by this Court.

If the decision of the Court of Appeals is permitted to stand, it will be used as authority for the proposition

that a negligence case which has been established by circumstantial evidence in a jury trial can be reviewed by a Court of Appeals as an appellate jury.

This would be so because a Court of Appeal, or a trial judge, who was reluctant to accept a jury's verdict, could always think of some "possibilities" of negligence of a third person or stranger and say that no probabilities could be deduced from the evidence which had been passed on by the jury and which decided the guilt of the defendant.

If there is probative evidence in the record from which fair-minded persons could draw reasonable inferences of the defendant's guilt a jury question is presented even though this evidence is not conclusive or overwhelming. There was such probative evidence in the case at bar.

This Court said in *Barry* v. *Edmunds*, 116 U. S. 550, 565 (1885):

> "In no case is it permissible for the court to substitute itself for the jury and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award."

It is petitioner's firm and consistent belief that the Court of Appeals weighed the evidence and substituted its judgment for the verdict of the jury in violation of the directions of this Court.

As was said in Volume 29, *Marquette Law Review*, Page 78:

> "Congress in the future may choose to pass a Federal Workmen's Compensation Act which will fill the gap, but in the meantime both Congress and the Supreme Court of the United States obviously intend that the Act shall be liberally construed and wherever

uncertainty as to the existence of negligence arises from the evidence, or where fair-minded men will honestly draw different conclusions as to the negligence from undisputed facts, the question is not one of law but one of fact to be settled by the jury."

CONCLUSION.

Petitioner respectfully submits that the judgment of the Court of Appeals for the Seventh Circuit should be reversed and that the judgment of the trial court on the verdict of the jury should be affirmed.

Respectfully submitted,

CARL L. YAEGER
Foshay Tower
Minneapolis 2, Minnesota
Attorney for Petitioner

ROBERT J. RAFFERTY
30 N. LaSalle Street
Chicago 2, Illinois
Of Counsel.